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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR MEDINA SANCHEZ,

Defendant and Appellant.

B290371

(Los Angeles County

Super. Ct. Nos.

VA145186, VA146691)

APPEALS from a judgment of the Superior Court of Los Angeles County. Raul Sahagun, Judge. Affirmed and remanded with directions.

Rudolph J. Alejo, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar Medina Sanchez appeals the judgment entered following a jury trial in Los Angeles County Superior Court case No. VA145186, in which he was convicted of one count of second degree robbery. (Pen. Code,¹ § 211.) The jury further found true the allegation that appellant personally used a firearm in the commission of the crime. (§ 12022.53, subd. (b).) Sanchez also appeals the judgment entered following a plea of no contest to one count of first degree burglary (§ 459) with personal use of a firearm (§ 12022.53, subd. (b)) in Los Angeles County Superior Court case No. VA146691.² In both cases, appellant admitted that he had a prior felony conviction for a 2006 robbery in San Bernardino County Superior Court case No. FBA008896, which qualified as a prior strike under the Three Strikes law (§§ 667, subd. (b)–(j), 1170.12) and a prior serious felony conviction under section 667, subdivision (a)(1).

Appellant entered his plea pursuant to *People v. West* (1970) 3 Cal.3d 595, and was sentenced in both cases on April 10, 2018. In case No. VA145186 (robbery) the trial court sentenced appellant to an aggregate term of 25 years in state prison. The sentence consisted of the high term of five years for the robbery, doubled to 10 years for the prior strike conviction, plus 10 years for the firearm enhancement under section 12022.53, subdivision

¹ Undesignated statutory references are to the Penal Code.

² By order of this court, the two appeals were consolidated, but the appeal from the judgment in case No. VA146691 is limited to issues that do not require a certificate of probable cause.

(b), and an additional five years for the prior serious felony conviction under section 667, subdivision (a)(1).

In sentencing appellant in case No. VA146691 (burglary), the trial court struck the prior strike and, treating the sentence on the burglary conviction as a subordinate term, imposed a consecutive sentence of nine years, eight months. The sentence consisted of a base term of one year, four months (that is, one-third the midterm), plus three years, four months (one-third of the 10-year term under § 12022.53, subd. (b)) for the firearm enhancement, and five years for the prior serious felony conviction (§ 667, subd. (a)(1)).

The parties agree that the trial court erred in twice imposing the five-year enhancement under section 667, subdivision (a)(1) for the single prior serious felony conviction. The parties further agree that the firearm enhancement imposed under section 12022.53, subdivision (b) for the burglary conviction is unauthorized. However, respondent argues that this court should “replace” the unauthorized enhancement with an identical enhancement under section 12022.5, subdivision (a). Finally, appellant contends that Senate Bill No. 1393³ requires remand to afford the trial court an opportunity to exercise its discretion to strike the remaining prior serious felony enhancement under section 667, subdivision (a)(1). Respondent asserts that remand is unnecessary because this court can correct the trial court’s errors with respect to the unauthorized imposition of enhancements, and the record clearly indicates the

³ Statutes 2018, chapter 1013, section 2.

court would not dismiss the remaining enhancement given the opportunity to do so.

We conclude that the trial court erred in twice imposing the five-year enhancement under section 667, subdivision (a)(1) for the single prior serious felony conviction, and imposing a firearm enhancement pursuant to section 12022.53, subdivision (b) for the burglary conviction. The matter is therefore remanded for resentencing, and the trial court ordered to strike one of the section 667, subdivision (a)(1) enhancements and the enhancement imposed pursuant to section 12022.53, subdivision (b) in Case No. VA146691. Upon resentencing the trial court may exercise its discretion under Senate Bill No. 1393 to strike or impose the remaining five-year enhancement and to determine what, if any, firearm enhancement to impose in Case No. VA146691.

FACTUAL BACKGROUND

The Burglary—Case No. VA146691

On May 5, 2017, appellant banged on the front door to Ashley Forbes's residence. Identifying himself as a police officer, appellant demanded she let him in. When Forbes refused to open the door, appellant unzipped his sweater to expose a bullet proof vest. He then pulled a black handgun from his waistband and kicked the door down. Appellant entered the residence and took a wallet and two purses belonging to Forbes.

The Robbery—Case No. VA145186

Around 4:00 in the afternoon on July 1, 2017, Raymond Deras was at a park in Downey for a family reunion. Deras was sitting in the driver's seat of his car with the window rolled down, waiting for his girlfriend who was using the restroom. Appellant, who had been sitting on the curb nearby, got up and approached

Deras's car, lifting his shirt to reveal a black gun tucked into his waistband. Appellant said, " 'Give me all your shit,' " and raised the gun. Deras handed appellant his wallet, which contained one dollar. Appellant reached into the back seat through the car's open window and took a jar of marijuana. Appellant then left and entered a parked vehicle. Deras took a picture of appellant's car and the license plate with his cell phone before appellant drove away.

Appellant later admitted to police he was at the park that day, but denied robbing Deras. When confronted with Deras's description of the incident, appellant told police that appellant's wife had given Deras an angry look because Deras was smoking marijuana in his car, but appellant had no interaction with Deras. As appellant and his family were leaving in their car, appellant saw Deras take a picture of him.

DISCUSSION

I. The Trial Court Erred by Applying the Prior Serious Felony Enhancement under Section 667, Subdivision (a)(1) to Both of Appellant's Convictions

In imposing consecutive sentences for appellant's two convictions, the trial court treated the robbery in case No. VA145186 as the principal term, and the residential burglary in case No. VA146691 as the subordinate term in accordance with section 1170.1, subdivision (a).⁴ But instead of imposing the five-

⁴ Section 1170.1, subdivision (a) provides in relevant part: "[W]hen any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or

year enhancement under section 667, subdivision (a)(1) only once for appellant’s single prior serious felony conviction, the trial court used that prior conviction to impose two five-year enhancements—one for each offense. The parties agree that because the prior serious felony enhancement is “status-based,” it could only be applied once, and the trial court erred by adding it to both the principal and subordinate terms.

Section 1170.1, subdivision (a) prescribes the calculation of the sentence when a court imposes consecutive determinate sentences on two or more separate criminal convictions as “the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions.” In determining the enhancements to be applied in sentencing, our Supreme Court has explained that “section 1170.1 draws an important distinction between offense-based

courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.”

enhancements, which apply to every relevant count, and status-based enhancements, which apply only once.” (*People v. Sasser* (2015) 61 Cal.4th 1, 15 (*Sasser*).) Offense-based enhancements derive from the circumstances of the current crime(s), such as when a firearm is used or great bodily injury inflicted. (*Sasser*, at p. 10; *People v. Williams* (2004) 34 Cal.4th 397, 402 (*Williams*).) On the other hand, status-based enhancements derive from the nature of the offender. (*Sasser*, at p. 10.) These include enhancements for prior convictions, such as the five-year enhancement under section 667, subdivision (a)(1) for a prior serious felony conviction. (*Sasser*, at p. 16.) While offense-based enhancements may apply to several counts, status-based enhancements “‘have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence.’” (*Williams*, at p. 402; *Sasser*, at p. 16 [as a status-based enhancement, the five-year prior serious felony enhancement is “not a ‘specific enhancement’ that may be added to each individual count”].)

The trial court in this case could properly impose only one five-year sentence enhancement because appellant had only one prior serious felony conviction. The trial court’s error in applying the enhancement to appellant’s sentence in both cases requires remand for resentencing.

II. The Enhancement Imposed for the Burglary Conviction Is Unauthorized

Appellant contends and the Attorney General concedes that the firearm enhancement imposed pursuant to section 12022.53,

subdivision (b)⁵ for the burglary conviction in case No. VA146691 is unauthorized because residential burglary is not listed as a qualifying offense in subdivision (a). We agree.

Section 12022.53, subdivision (a) lists 18 offenses to which the 10-year enhancement under subdivision (b) applies. Because residential burglary is not among these offenses, the enhancement imposed in appellant's burglary case is unauthorized. (*People v. Price* (2004) 120 Cal.App.4th 224, 243 ["A sentence is unauthorized when it could not lawfully be imposed under any circumstances in the particular case"].)

The firearm enhancement imposed in case No. VA146691 must be stricken. Respondent, however, contends that rather than remanding to the trial court, this court may simply "replace" the unauthorized enhancement under section 12022.53, subdivision (b) with a lesser included enhancement under section 12022.5, subdivision (a). We disagree.

Section 12022.5, subdivision (a) requires the trial court to exercise its discretion to impose an additional and consecutive state prison term of three, four, or 10 years for the personal use of a firearm in the commission of a felony. It is for the trial court, not this appellate tribunal, to make the determination of whether appellant's plea supports imposition of an enhancement under

⁵ Section 12022.53, subdivision (b) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

section 12022.5, subdivision (a), and if so, which term is appropriate considering the facts of the case and the court’s sentencing goals. Further, as amended by Senate Bill No. 620,⁶ section 12022.5, subdivision (c) now confers upon the trial court the additional discretion, “in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section.” Because the authority provided by the amendment “applies to any resentencing that may occur pursuant to any other law” (§ 12022.5, subd. (c)), remand is necessary to permit the trial court to exercise its discretion with respect to imposition of any firearm enhancement in case No. VA146691.

III. On Remand the Trial Court Also Has Discretion to Reconsider Imposition of the Remaining Five-Year Enhancement under Section 667, Subdivision (a)(1)

On September 30, 2018, the Governor signed Senate Bill No. 1393, which amended sections 1385 and 667 to give trial courts discretion to strike the five-year enhancement under section 667, subdivision (a)(1). The law became effective on January 1, 2019, and applies retroactively to cases in which judgment is not yet final on appeal. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all

⁶ Statutes 2017, chapter 682, section 1.

defendants whose judgments are not yet final on the statute's operative date"], fn. omitted.)

Prior to Senate Bill No. 1393, section 1385, subdivision (b) expressly prohibited a trial court from striking “‘any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.’” (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045, fn. 2 [under § 1385, subd. (b), trial court has no discretion to strike § 667, subd. (a) enhancement].) Senate Bill No. 1393 eliminated this restriction.

In the context of Senate Bill No. 620, courts have held that remand is required absent a clear indication that the trial court would *not* have reduced the sentence even if it had discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) However, citing our decision in *People v. McVey* (2018) 24 Cal.App.5th 405 (*McVey*), the Attorney General contends that remand is not warranted here because the record plainly shows the trial court would not dismiss the enhancement in any event. Respondent points to the trial court's statements at sentencing that appellant's conduct was “extremely violent” and there was “not much by way of mitigation,” and emphasizes the court's imposition of the upper term on the robbery conviction to assert that it is “inconceivable” the trial court would reduce appellant's aggregate sentence by dismissing the five-year enhancement when it expressly refused appellant's request at sentencing to reduce it by just two years.

We are unpersuaded. In *McVey*, the trial court exercised its discretion to impose the highest possible firearm enhancement pursuant to section 12022.5, subdivision (a), declaring, “‘[T]his is as aggravated as personal use of a firearm gets,’ and ‘the high term of 10 years on the enhancement is the only appropriate

sentence on the enhancement.’ ” (*McVey, supra*, 24 Cal.App.5th at p. 419.) In contrast to *McVey*, the trial court in this case gave no such clear indication that it would not consider striking the prior conviction enhancement even if it believed it had the discretion to do so.

Further, the trial court did exercise its discretion under section 1385 to strike appellant’s prior strike for purposes of sentencing on the burglary conviction under the Three Strikes law. This exercise of the court’s discretion in the context of the whole record of the sentencing proceedings provides some indication of the court’s view that appellant’s addiction issues and family support warranted at least a partially mitigated sentence. Given that the trial court will conduct a new sentencing hearing in any event, we will not speculate as to how the trial court might exercise its discretion in reconsidering all of the sentencing choices available as it imposes a new sentence. (*People v. Hill* (1986) 185 Cal.App.3d 831, 834 [“an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components”]; see *People v. Garner* (2016) 244 Cal.App.4th 1113, 1118.)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded with directions that the trial court strike the Penal Code section 12022.53 firearm enhancement imposed in Los Angeles County Superior Court case No. VA146691, and strike one of the five-year prior serious felony enhancements imposed under Penal Code section 667, subdivision (a)(1). The trial court is further ordered to conduct a new sentencing hearing to reconsider all of the sentencing choices available, including the exercise of its discretion with regard to imposition of any firearm enhancement under Penal Code section 12022.5, subdivision (a) in Los Angeles County Superior Court case No. VA146691, and the discretion to impose or strike the remaining Penal Code section 667, subdivision (a)(1) enhancement. Following resentencing, the trial court is ordered to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.